IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 74-2

BILL SWAD CHRYSLER-PLYMOUTH CO.,
Petitioner

v.

565 EAST BROAD, INC.
Respondent

BRIEF IN OPPOSITION TO PETITICN FOR A WRIT OF CERTIORARI

ARGUMENT

1. No Federal Question Was Raised In The State Courts.

Supreme Court Rule 23, 1(f) requires that the Petition for Writ of Certiorari shall state specifically how, where and when the federal question sought to be reviewed was raised in the state courts and how it was disposed of by the state courts. The petition herein states that the federal question sought to be reviewed is a violation of the Due Process Clause of the Fourteenth Amendment to the Constitution. Nowhere in the Petition is there one word which meets the requirements of Supreme Court Rule 23, 1(f) as to this federal question. The reason is obvious—it is impossible to do so. No question was ever raised at any stage of the proceedings in any of the state courts as to violation of the Due Process Clause of the Fourteenth Amendment by 565 East

Broad, Inc. or by any of the state courts in the subject action. A review of the opinion of the Court of Appeals of Franklin County, Ohio, found in Appendix B of the Petition, and of the Court of Common Pleas of Franklin County, Ohio, found in Appendix C, affirms this statement.

The opinion of the Court of Appeals sets forth each assignment of error made by Bill Swad Chrysler-Plymouth Company in its appeal. These assignments are set forth as follows in Appendix B of the Petition for Writ of Certiorari:

> First Assignment of Error—bottom of page 13 of petition;
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> Second Assignment of Error—top of page 15 of petition;
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> Third Assignment of Error—bottom of page 20 of petition;
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> Fourth Assignment of Error—top of page 21 of petition.

Nowhere in these assignments of error was any federal question presented.

It is interesting to note that the question of notice (the basis of the purported federal question) was raised in the Fourth Assignment of Error in the Court of Appeals. It is further interesting to note that this assignment of error was based upon the claim that the reletting of the premises by the landlord, where no notice of its intention to do so was given to the lessee, operated as a surrender under the lease and terminated the lease. This was the sole argument advanced in the Court of Appeals on the matter of notice, was upon an entirely different theory than that which is now advanced as the basis for the granting of the Petition, and

obviously had nothing to do with any supposed violation of the Fourteenth Amendment.

It is fundamental, of course, that this court does not have jurisdiction if a review of a judgment of a state court is sought, unless a federal question has been properly raised somewhere in the proceedings in the state court. Justice White very succinctly states the position of this court on this subject in *Cardinale* vs. *Louisiana*, 394 U.S. 437:

> Page 438: "It was very early established that the Court will not decide federal constitutional questions raised here for the first time on review of state court decisions. In *Crowell* vs. *Randall*, 10 Pet. 368 (1836) Justice Story reviewed the earlier cases commencing with *Owings* vs. *Norwood's Lessee*, 5 Cranch 344 (1809) and came to the conclusion that the Judiciary Act of 1879 c 20 Sec. 25, 1 Stat. 85 vested this court with no jurisdiction unless a federal question was raised and decided below. 'If both of these do not appear on the record the appellate jurisdiction fails', 10 Pet. 368, 391. The Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions both before the Crowell opinion, *Miller* vs. *Nicholls*, 4 *Wheat.* 311, 315 (1819) and since e.g. (citing cases)."

This court has consistently adhered to this position, as evidenced by every reported opinion where the question has been raised.

Lacking the necessary foundation for a review of the judgments of the state courts by this court in this case, the Petition for Writ of Certiorari herein must surely fail.

2. Fuentes vs. Shevin Not Applicable.

Petitioner has based its reason for granting the writ

on the case of Fuentes vs. Shevin, 407 U.S. 67. A review of the opinion in that case reveals that it applies to replevin actions and the procedure thereunder in two states. Under that procedure, property may be taken by legal process prior to, and without hearing as to, the rights to that property. In other words, the question raised in that action was as to the constitutionality of statutes which would permit the taking of a person's property without notice to that person and without a prior hearing as to the rights to that property.

The facts in that case and the determination by this court of the law in that case have no bearing upon, nor any resemblance to, the facts in the present case and the legal questions involved. No property was taken here. The only question raised is whether the lessee, the petitioner herein, was entitled to, and should have had some sort of notice from the landlord that the premises were being sublet by the landlord.

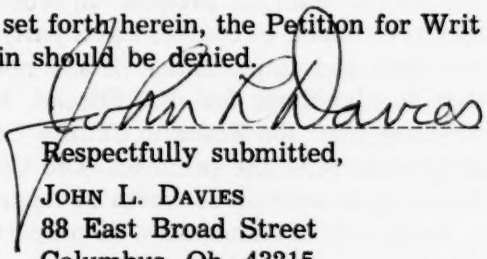
Petitioner's claim is based upon the assumption that the building involved had been condemned and thus made unfit for occupancy and later restored to fitness, at which time Petitioner says it should have been notified. Both the trial court and the Court of Appeals found that the building had not been condemned and, accordingly, had always been available for occupancy. Thus, petitioner's claim is based upon a completely false premise. The truth of the matter was, as found by both the trial court and the Court of Appeals, that petitioner voluntarily abandoned the premises (more than a year before the incident on which it bases its notice claim), never thereafter re-entered them, and made no attempt to either make use of them or to sublet them. To the contrary, in a previous trial involving the same parties, the same premises, and the same lease, the Franklin

County Court of Appeals had held that the landlord had the duty to relet the premises in order to mitigate damages. Petitioner, of course, was a party to the action and therefore had ample notice (if any notice was required) that the landlord, 565 East Broad, Inc., was under a mandate from the Franklin County Court of Appeals to attempt to relet the premises. The Court of Appeals so found in its opinion set forth in Appendix B (page 21).

Under any circumstances, no property was taken from the lessee by the reletting of the premises by the lessor. To the contrary, it was to the benefit of the lessee since any subletting reduced the amount which it was required to pay. Accordingly, there was no taking of any property of the lessee. To the contrary, there was actually an addition to the property of the lessee, by virtue of the reduction of its liability on the lease.

CONCLUSION

For the reasons set forth herein, the Petition for Writ of Certiorari herein should be denied.



Respectfully submitted,

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